IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-502

NANCY GAYLE SMART, *Petitioner*

v.

CLARENCE JONES, ET AL., *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari, entered on December 23, 1974, and (2) granting the Petition. As grounds for this motion, Petitioner states the following:

STATEMENT OF THE CASE

A woman of "small means" was subjected to a custodial arrest without a warrant, handcuffed behind her back in

a violent manner, her car confiscated, and she was carried around in a squad car for more than an hour before being brought before a magistrate. The Respondent claiming to have witnessed the traffic offense of reckless driving, now alleged to be the basis of probable cause, drove away without offering a traffic citation while she was stopped in his presence. The custodial arrest was made at a different time and place by other officers. This is a prototype of the case which Chief Justice Burger must have been referring to in his Report on the Federal Judicial Branch, 60 ABAJ 1193, 1194 (Oct. 1974), when he stated:

> ". . . the means of making the system of justice more responsive to the needs of people of small means and of the problems which have seemed too modest to engage the attention of lawyers. Few things rankle in the human breast so deeply as a sense of injustice.

It has been set forth by Respondents in a firm and unequivocable manner for the first time in their Brief in Opposition before the Supreme Court of the United States what alleged infraction of law was the basis upon which their defense of probable cause for custodial arrest without a warrant stood. The Assistant Criminal District Attorney, as their counsel, has come to rest solely on Art. 6701(d), Sects. 51 and 153 of Tex. Rev. Civ. Stat. Ann. Respondents' total defense for the first time now rests upon a minor traffic violation. This constitutes an abandonment, waiver, and admission of lack of merit of the previous defense set forth that Petitioner had violated five articles of the Texas Penal Code. A confession of error has now been admitted as to all prior court proceedings.

The trial court record was completely devoid of any suggestion that Respondents' defense rested upon a minor traffic violation. Neither Petitioner, Judge, nor Jury were presented with the real basis of probable cause to arrest without a warrant. Petitioner has been denied her constitutional rights pursuant to the Fourth, Eighth and Fourteenth Amendments to the Constitution of the United States on the trial of this case.

At every stage of this proceeding Petitioner has had to meet constantly changing defenses which were not pleaded in accordance with Fed. R. Civ. P. 8(c). The chronological history of this case is as follows:

Sept. 11, 1972: Petitioner was charged with violation of Arts. 336 and 1147 of the Texas Penal Code with a bond of $500.00 for each charge. She was placed in jail and the Dallas County Criminal District Attorney filed formal charges.

Nov. 11, 1972: Petitioner filed this federal civil rights suit and Assistant Criminal District Attorney John B. Tolle, who is normally in charge of civil litigation, became the special prosecutor in state criminal court, presumably to line up his defense in the civil suit. His answer for Respondents in the civil suit pleaded violations of Arts. 340 and 1147, Texas Penal Code. He continued to prosecute Petitioner on Arts. 336 and 1147, Texas Penal Code, until he dismissed all charges on April 23, 1973.

Sept. 25, 1973: The first trial in Federal District Court, Cause No. 3-6478-B, resulted in a hung jury. Respondent pleaded Arts. 340 and 1147.

Texas Penal Code; such a defense was presented in the charge to the jury as a basis of probable cause.

Nov. 11, 1973: The second trial of this cause with a verdict for Respondents was based upon the same defenses. (Sup. A. 10, 11, 12, 13, 14, and 15)

Jan. 26, 1974: Dallas County Assistant Criminal District Attorney John B. Tolle in Respondents' Brief to the Fifth Circuit waived and abandoned any contention of a violation of Arts. 336, 340, and 1147, Texas Penal Code, and raised for the first time violations of Arts. 1138 and 1139, Texas Penal Code, and Art. 6701(d), Sect. 51, Tex. Rev. Civ. Stat. Ann.

Nov. 27, 1974: Respondents' Brief in Opposition No. 74-502 filed in this Honorable Court set forth at page 8: "Grandstaff had ample probable cause to believe that Petitioner was guilty of the offense of reckless driving in violation of Art. 6701(d), Sec. 51, V.A.C.S., and was authorized to arrest her without a warrant by virtue of the provisions of Art. 6701(d), Sec. 153."

Respondents' Brief thereby admitted by waiver and abandonment, that Petitioner had not violated any penal statutes as previously contended.

In summary, Petitioner was prosecuted in County Criminal Court No. 2, Dallas County, Texas, for eight months for alleged violations of Arts. 336 and 1147, Texas Penal Code. Three months subsequent to her arrest, Art. 336 was waived and abandoned and Art. 340 was substituted as a defense to her civil rights suit by Respondents,

although there was a continuing prosecution for violation of Art. 336 for five more months before it was dismissed. Sixteen months after her arrest, Respondents' Brief No. 73-3879 in the Fifth Circuit abandoned and waived any violation of Arts. 336, 340, and 1147, Texas Penal Code, and based their probable cause on alleged violations of Arts. 1138 and 1139, Texas Penal Code, and added Art. 6701(d), Sect. 51, Tex. Rev. Civ. Stat. Ann. Now, *two years and three months after her arrest,* Respondents have arrived at the final resting point and foundation for their probable cause to arrest without a warrant, which is merely a minor traffic violation. The treatment inflicted upon Petitioner, now conclusively founded upon a minor traffic violation, is prima facie evidence of violation of her federally protected civil rights. This is an admission by Respondents and their attorney of their complete lack of good faith throughout these proceedings. Petitioner, who was taking her child to school and on her way to work, was custodially arrested without a warrant, forcibly handcuffed behind her back with resulting serious injury, taken before a JP Court and denied the opportunity to have an attorney represent her, bond was set at $1,000.00, she was incarcerated in jail, mug shot and fingerprinted, and her car was confiscated, all of which was based on a minor traffic violation. This raises the question whether the present system of justice is sufficiently responsive to the needs of people of "small means" to correct gross miscarriage of justice and to prevent abuse of power by public officials.

REASONS TO VACATE

1. RESPONDENTS' BRIEF IN THIS HONORABLE

COURT ESTABLISHED FOR THE FIRST TIME BASIS OF PROBABLE CAUSE FOR PETITIONER'S ARREST.

At every stage of this proceeding Petitioner has been faced and required to meet new allegations of criminal offenses with which she was never charged or prosecuted. The trial of this case was based upon Defendants' Original Answer which stated:

> "Defendants J. W. Grandstaff, Benny Barrett and Gail Barrett would further show that on or about September 11, 1972, while the said J. W. Grandstaff was attempting to perform his duty of serving civil process, plaintiff forcibly interfered with his performance of such duty and committed an aggravated assault upon the said J. W. Grandstaff, all in violation of provisions of Articles 340 and 1147 of the Texas Penal Code. Said defendants would further show that they arrested plaintiff pursuant to the provisions of Article 14.01(b), V.A.C.C.P." (A. 11)

Respondents' Brief before this Honorable Court states:

> ". . . Grandstaff had ample probable cause to believe that petitioner was guilty of the offense of reckless driving in violation of Art. 6701(d), Sec. 51, V.A.C.S., and was authorized to arrest her without a warrant by virtue of the provisions of Art. 6701(d), Sec. 153."

The defense now urged by Respondents before this Honorable Court was unknown at the time of trial to Petitioner, Judge, or Jury.

There was no valid judgment based upon matters not before the trial court. Respondents have abandoned and waived all previous defenses to support probable cause.

Respondents' abandonment and waiver of all other previous defenses constitutes a confession of error as to the trial court judgment.

2. RESPONDENTS' BRIEF IN THIS HONORABLE COURT PRESENTS VIOLATION OF ART. 6701(d), SEC. 51, TEX. REV. CIV. STAT. ANN., AS AN AVOIDANCE OR AFFIRMATIVE DEFENSE AND THIS DEFENSE WAS NOT PLEADED IN THE TRIAL AS REQUIRED BY FED. R. CIV. P. 8(c).

In two trials of this case Respondents pleaded their affirmative defense of violation of Arts. 340 and 1147, Texas Penal Code, and Art. 14.01(b) Tex. Code Crim. P. in accordance with Fed. R. Civ. P. 8(c). (A. 17, 18) It can now be seen for the first time what the true basis of their defense of probable cause was and this basis, Art. 6701(d), Sec. 51, Tex. Rev. Civ. Stat. Ann., was not set forth as required by Fed. R. Civ. P. 8(c). This is prima facie denial of due process. The avoidance or affirmative defense based on Art. 6701(d), Sec. 51, Tex. Rev. Civ. Stat. Ann., was not before the trial court. Respondents' Brief in this Court is a contradiction and denial of the affirmative defenses set forth before the trial court.

3. GOOD FAITH IS A CO-EQUAL AND NECESSARY ELEMENT TO PROBABLE CAUSE WHICH MUST BE AFFIRMATIVELY PLEADED AND PROVEN BY RESPONDENTS.

Respondents did not raise in their Original Answer, or at any state of this proceeding, good faith as to probable cause to arrest without a warrant. (A. 17, 18) This is a further violation of Fed. R. Civ. P. 8(c).

The complaining and initiating Respondent, Deputy Sheriff J. W. Grandstaff, had approximately 350 hours of police academy instruction as to the proper performance of the duties of his office. (A. 57) J. W. Grandstaff had the opportunity, at the time of what is now admitted before this Court to be a minor traffic offense, to issue a traffic citation to Petitioner, but he refused to do so and drove away. (A. 59, 60) This same Deputy Sheriff broadcast on the police radio an order, " . . . put this woman in jail." (A. 61) No charges were stated to Petitioner when arrested and handcuffed behind her back by the arresting Respondent Benny Barrett acting on the broadcast order. (A. 68)

Respondents' own authority, *Ada Oil Co. v. Dillaberry*, 440 S.W.2d 902, 910 (CA 1969, reh. den. 1969, writ err. dism'd.), which is the unquestioned rule in the State of Texas, states:

> "Texas courts have uniformly applied the rule that a party filing or causing the filing of a criminal complaint does so upon probable cause where he, in good faith, makes a full and fair disclosure of the facts and circumstances known to him and the complaint is thereafter filed. *Sebastian v. Cheney*, 86 Tex. 497, 25 S.W. 691; *Missouri, K. & T. Ry. Co. of Texas v. Groseclose*, 50 Tex. Civ. App. 525, 110 S.W. 477, no writ hist.; *Andrews v. Dewberry*, 242 S.W.2d 685 (Tex. Civ. App.), writ ref., n.r.e. The above rule is not applicable unless the party filing the complaint acts in good faith in disclosing to the prosecuting attorney all facts known to him, and if defendant knows that plaintiff is not guilty of a criminal offense, probable cause does not exist, and a suit for malicious prosecution may be main-

tained if other elements are proven. See *J. C. Penney Co. v. Gilford*, 422 S.W.2d 25 (Tex. Civ. App.), writ ref., n.r.e."

In the joint efforts of the Respondents, the Criminal District Attorney of Dallas County, Texas and his staff, as shown in the record of this case, have tried with great resourcefulness to extricate themselves from the difficulties resulting from their enthusiastic approach to file untenable and exaggerated criminal charges against Petitioner. For the benefit of their clients this same District Attorney and his Assistant John B. Tolle, voluntarily and deliberately interjected their public office and official conduct into the case by presenting to the jury that the criminal charges filed against Petitioner were wrong, and that correct charges could be filed. (A. 72, 73) No charges, correct or incorrect, have been filed by the Criminal District Attorney against Petitioner and cannot be filed because the statute of limitations has run, Art. 12.05, Tex. Code Crim. P. Moreover, the Assistant District Attorney acting under his official title stated before the jury, it was the responsibility and duty of Petitioner to prove her innocence. This was objected to, but overruled, to which Petitioner excepted. (A. 72)

Even this last ditch stand of grasping at the straw of a minor traffic offense in the civil code is not made in good faith or is available to Respondents as they have made no gesture of compliance with the requisites of an arrest pursuant to that code, e.g., issuance of a traffic summons. This is specifically set out in Tex. Rev. Civ. Stat. Ann., Art. 6701(d), Sects. 147 and 148. (see addendum)

There is no evidence in the record to justify the treatment inflicted upon Petitioner under 6701(d), (traffic regulation), Tex. Rev. Civ. Stat. Ann.

This Honorable Court's attention, as further evidence of the lack of good faith by Respondents and their counsel, is directed to Respondents' Brief before this Court at page 9, *Witherspoon v. State*, 61 S.W. 396, at 398 which is misquoted by omitting "of law."

4. THERE IS PENDENT JURISDICTION IN THE FEDERAL COURT FOR PETITIONER'S CAUSE OF ACTION.

The doctrine of pendent jurisdiction permits the consideration of the related state claims, *Moore v. County of Alameda*, 411 U.S. 693; *Mine Workers v. Gibbs*, 383 U.S. 715.

5. RESPONDENTS' PRESENT DEFENSE PRESENTS PRIMA FACIE EVIDENCE OF SUMMARY PUNISHMENT INFLICTED UPON PETITIONER.

The question of summary punishment did not arise before Respondents filed their Brief before this Honorable Court. The admission that Respondents' only defense rests on Art. 6701(d), Sect. 51, (traffic regulations), Tex. Rev. Civ. Stat. Ann. is, as a matter of law, a confession of the illegal and wrongful interference with Petitioner's liberties and was to inflict summary punishment upon Petitioner without due process of law contrary to the Eighth and Fourteenth Amendments to the Constitution of the United States. The punishment inflicted bears no relation, and is unconscionable, to the defense now pleaded, *Hampton v.*

City of Chicago, Cook County, Illinois, 484 F.2d 602 (7th Cir. Aug. 24, 1973); 415 U.S. 917 (cert. den. Feb. 19, 1974); *Anderson v. Nosser*, 456 F.2d 835 (5th Cir. Mar. 3, 1972); 409 U.S. 848 (cert. den. Oct. 10, 1972).

6. THE ABA CODE OF PROFESSIONAL RESPONSIBILITY MUST BE UPHELD IN FEDERAL COURTS IF THE PUBLIC AND THE BAR IS TO TAKE THEM SERIOUSLY.

On August 14, 1964 at the request of President Louis F. Powell, Jr., the ABA House of Delegates created a special committee on ethical standards to examine the current canons and make recommendations for changes. The present canons are an outgrowth of that work.

Petitioner repeats and reiterates point 3 of Reasons for Granting the Writ in her Petition for Writ of Certiorari in which the actions and conduct of the Dallas County District Attorney's office was contrary to the ABA Code of Professional Responsibility.

CONCLUSION

The trial and appellate federal courts in this case have laid down the rule of law that good faith on the part of law enforcement officers need not be pleaded or proven to sustain a judgment in their favor based on the defense of probable cause.

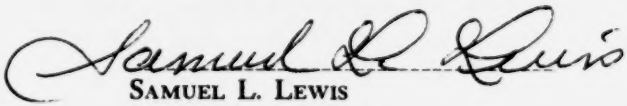
This holding endorses cooperation between a criminal district attorney and sheriff to create a defense in which the law enforcement and prosecutor's office of the state use their power and authority to invalidate 42 U.S.C. 1983.

This case creates precedent that a defendant can abandon trial defenses and interject new, strange, and unrelated defenses at every stage of the appellate proceeding in the federal courts.

This case involves a woman of "small means" and whether the present system can protect people of "small means" from denial of due process of law and summary punishment by public officials who abuse their power.

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant rehearing of the Order of Denial, vacate that Order, grant the Petition and review the judgment and opinion below.

Respectfully submitted,



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CERTIFICATE

This is to certify this Petition for Rehearing is filed in good faith, in the firm belief matters herein presented are fundamental and meritorious; and the same is not urged to cause delay but in the interest of substantial justice and is restricted to the grounds specified in Rule 58(2).

Samuel L. Lewis

SAMUEL L. LEWIS

CERTIFICATE OF SERVICE

I, Samuel L. Lewis, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Rehearing on counsel for Respondents, by depositing same in the United States mail, postage prepaid, on January 14, 1975, addressed to John B. Tolle, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas, 75202, and Henry Wade, Criminal District Attorney, Dallas County Courthouse, Dallas, Texas, 75202, counsel of record for Respondents. All parties required to be served have been served.

Samuel L. Lewis

SAMUEL L. LEWIS

ADDENDUM

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment IV, in pertinent part:

Appearing in Petition for a Writ of Certiorari, p. 27.

United States Constitution, Amendment V, in pertinent part:

Appearing in Petition for a Writ of Certiorari, p. 27.

United States Constitution, Amendment XIV, in pertinent part:

Appearing in Petition for a Writ of Certiorari, p. 27.

Federal Rules of Appellate Procedure Fifth Circuit Local Rule No. 21:

Appearing in Petition for a Writ of Certiorari, p. 27.

Title 28 United States Code, in pertinent part:

Sect. 1343(3) Appearing in Petition for a Writ of Certiorari, p. 28.

Title 42, United States Code, in pertinent part:

Sect. 1983 Appearing in Petition for a Writ of Certiorari, p. 28.

Sect. 1985 Appearing in Petition for a Writ of Certiorari, p. 28-29.

Sect. 1986 Appearing in Petition for a Writ of Certiorari, p. 29.

Sect. 1988 Appearing in Petition for a Writ of Certiorari, p. 30.

Texas Penal Code, in pertinent part:

Art. 336 Appearing in Petition for a Writ of Certiorari, p. 31.

Art. 340 Appearing in Petition for a Writ of Certiorari, p. 31.

Art. 1147 Appearing in Petition for a Writ of Certiorari, p. 32.

Texas Revised Civil Statutes Annotated, in pertinent part: Art. 6701(d)

Sec. 147. Whenever any person is arrested for any violation of this Act punishable as a misdemeanor, the arrested person shall be immediately taken before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of such offense and is nearest or most accessible with reference to the place where said arrest is made, in any of the following cases:

1. When a person arrested demands an immediate appearance before a magistrate;

2. When the person is arrested upon a charge of negligent homicide;

3. When the person is arrested upon a charge of driving while under the influence of intoxicating liquor or narcotic drugs;

4. When the person is arrested upon a charge of failure to stop in the event of an accident, causing death, personal injuries, or damage to property;

5. In any other event when the person arrested refuses to give his written promise to appear in court as hereinafter provided.

Notice to appear in court; promise to appear

Sec. 148. (a) Whenver a person is arrested for any violation of this Act punishable as a misdemeanor, and such person is not immediately taken before a magistrate as hereinbefore required, the arresting officer shall prepare in duplicate written notice to appear in court containing the name and address of such person, the license number of his vehicle, if any, the offense charged, and the time and place when and where such person shall appear in court. Provided, however, that the offense of speeding shall be the only offense making mandatory the issuance of a written notice to appear in court, and only then if the arrested person gives his written promise to appear in court, by signing in duplicate the written notice prepared by the arresting officer; and provided further, that it shall not be mandatory for an officer to give a written notice to appear in court to any person arrested for the offense of speeding when such person is operating a vehicle licensed in a state or country other than the State of Texas or who is a resident of a state or country other than the State of Texas.

(b) The time specified in said notice to appear must be at least ten (10) days after such arrest unless the person arrested shall demand an earlier hearing.

Texas Code of Criminal Procedure
Art. 12.05

An indictment or information for any misdemeanor may be presented within two years from the commission of the offense, and not afterward.